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5  
6 IN THE UNITED STATES DISTRICT COURT  
7 FOR THE DISTRICT OF ALASKA AT ANCHORAGE  
8  
9

10 HARRY CURTIS LUSK, )  
 )  
11 Plaintiff, )  
 )  
12 vs. )  
 )  
13 UNITED STATES OF AMERICA, )  
 )  
14 Defendant. )

15 Case No. 3:10-cv-00204-RRB

16 **PLAINTIFF'S MOTION AND MEMORANDUM FOR PARTIAL SUMMARY JUDGMENT**  
17

18 **I. INTRODUCTION**

19 Plaintiff seeks partial summary judgment pursuant to Fed.  
20 R. Civ. P. 56 that as a matter of law and fact the certified  
21 registered nurse anesthetist (CRNA) Brenda Bowler was an agent  
22 of the Federal Government at the time of Mr. Lusk's surgical  
23 procedure.  
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Harry Curtis Lusk v. USA

Case No. 3:10-cv-00204-RRB

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1        There is ample evidence to determine that CRNA Bowler is an  
2 agent of the Federal Government ("Government").<sup>1</sup>        Early  
3 resolution of this issue is necessary to avoid significant  
4 additional costs in the litigation and a subsequent appeal after  
5 a full trial.        The issue must be decided before discovery  
6 closes, the date for supplemental experts passes, and experts  
7 are deposed in order to avoid significant prejudice to Mr. Lusk  
8 and unnecessary costs to both parties.

9  
10        Plaintiff asserts that the type of conduct the Government  
11 engaged in by holding out the nurse anesthetist as an  
12 employee/agent of the Government before and during this  
13 litigation, then denying the same should be firmly discouraged  
14 by this Court.        If not, due diligence will require that all  
15 Federal Tort Claims Act (FTCA) cases be filed in both state and  
16 federal court simultaneously, before the administrative claim  
17 has been exhausted, because no attorney could rely on the  
18 affirmative representations of the Government, even if those  
19 representations come from an individual, as here, with actual or  
20 apparent authority to bind the Government.  
21  
22

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23        <sup>1</sup>        As discussed *infra*, Brenda Bowler's deposition was taken,  
24 as were the depositions of the two other referenced health care  
25 providers.        Additionally, initial expert disclosures have been  
26 exchanged which revealed for the first time the Government's  
attempt to blame CRNA Bowler for Mr. Lusk's injuries.

1 **II. FACTS**

2 **A. The Injury**

3 On April 17, 2007, Harry Lusk, a 15-year veteran of the  
4 United States Army, travelled to Anchorage from his home in  
5 Fairbanks to undergo outpatient rotator cuff surgery at the VA  
6 Ambulatory Surgery Center. He awoke from surgery with a  
7 permanent spinal cord injury. Mr. Lusk cannot use the fingers  
8 in either hand; he cannot form a fist or grip anything. Mr.  
9 Lusk's devastating injury is permanent and it is especially  
10 debilitating for a man who enjoyed hunting, fishing, and a self-  
11 reliant lifestyle in the Alaskan wilds.

12 **B. Procedural History**

13 Mr. Lusk's surgery was performed by Dr. Gates, an  
14 orthopedic surgeon. Brenda Bowler, a certified registered nurse  
15 anesthetist, provided Mr. Lusk's anesthesia care. From the  
16 beginning of the litigation, Plaintiff asserted that his prior  
17 cervical stenosis was exacerbated by his positioning during the  
18 surgery causing compression of his spinal cord.<sup>2</sup> Because the  
19 medical records are not clear, Mr. Lusk identified Dr. Gates,  
20 Mr. Hull and CRNA Bowler as potentially responsible parties.  
21  
22  
23  
24

25 <sup>2</sup> See Pl.'s Compl. [Docket 1].

1 Prior to filing an administrative claim and through years  
2 of litigation, the Government represented that Brenda Bowler was  
3 an employee of the Federal Government.<sup>3</sup> Those representations  
4 took many forms, as outlined in detail in Plaintiff's Opposition  
5 to Motion to Amend Answer.<sup>4</sup> Mr. Lusk incorporates the facts from  
6 his Opposition to the Motion to Amend Answer here.<sup>5</sup>  
7

8 Before filing the Form 95 Administrative Claim, Plaintiff's  
9 counsel contacted the Veteran's Administration (VA) General  
10 Counsel to ask about employee status and the propriety of the  
11 claims. The VA General Counsel, before any statute of  
12 limitations had run, affirmed that CRNA Bowler was an employee  
13 of the Government.<sup>6</sup>  
14

15 The VA investigated and considered Mr. Lusk's Form 95 Claim  
16 for nearly a year, from April 2009 to March 2010.<sup>7</sup> In its Final  
17 Denial, the VA disclosed that its "[i]nvestigation included  
18 interviews with the VA healthcare providers who were involved in  
19

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20 <sup>3</sup> See Pl.'s Opp'n to Mot. to Amend Answer [Docket 18].

21 <sup>4</sup> *Id.* at 3-11.

22 <sup>5</sup> *Id.*

23 <sup>6</sup> Aff. of Counsel [Docket 19].

24 <sup>7</sup> Exhibit A, Final Denial of Administrative Tort Claim, March  
25 16, 2010.

1 your client's care and independent medical experts," and "VA and  
2 non-VA medical records and medical literature."<sup>8</sup> Based on that  
3 investigation, the VA claimed it found no employee wrongful act  
4 or omission during the surgery that caused Mr. Lusk's injury.<sup>9</sup>  
5 At that time, CRNA Bowler was an employee, based on the VA's  
6 General Counsel's affirmative statements and as later  
7 specifically affirmed in the Government's Answer to the  
8 Complaint.<sup>10</sup>

10 The Government specifically denied that CRNA Bowler's  
11 conduct was negligent in both the denial of the tort claim and  
12 in its Answer.<sup>11</sup> But when it realized it had an opportunity to  
13 claim CRNA Bowler was not a VA employee, the Government moved to  
14 amend its Answer to deny that CRNA Bowler was a federal  
15 employee.<sup>12</sup> The Government conceded that the procedural history  
16 of this case was accurately reflected in Mr. Lusk's Opposition  
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20 <sup>8</sup> *Id.*

21 <sup>9</sup> *Id.*

22 <sup>10</sup> See Original Answer to the Compl. [Docket 7].

23 <sup>11</sup> *Id.*

24 <sup>12</sup> See United States' Mot. for Leave to File Amended Answer  
25 [Docket 17].

1 to the Motion to Amend Answer.<sup>13</sup> Importantly, the Government did  
2 not move to amend the denial of CRNA Bowler's negligence in the  
3 Answer. Yet its recent expert report shows that the Government  
4 now seeks to place the blame for Mr. Lusk's substantial  
5 permanent injuries on her.

6  
7 In discovery, Mr. Lusk asked the Government to reveal who  
8 it intended to blame for his injuries.<sup>14</sup> The Government answered  
9 that Mr. Lusk's injuries were a result of his preexisting  
10 condition.<sup>15</sup> Again, the Government did not claim that CRNA  
11 Bowler caused Mr. Lusk's injuries. Even after the Government  
12 amended its Answer, it never supplemented its answers to  
13 interrogatories to reveal its new strategy of blaming CRNA  
14 Bowler for Mr. Lusk's injuries.

15  
16 CRNA Bowler was deposed on June 13, 2012, three months  
17 before the Government disclosed its expert reports, (two months  
18 before those reports were due).<sup>16</sup> At the deposition, the

19  
20 <sup>13</sup> See United States' Reply to Pl.'s Opp'n to Mot. for Leave  
to File Amended Answer at 1 [Docket 21].

21 <sup>14</sup> Exhibit B, Def.'s Resp. to Pl.'s First Set of Disc. Req. to  
22 Def., Aug. 31, 2011.

23 <sup>15</sup> *Id.*

24 <sup>16</sup> The Government's expert reports were due July 27, 2012.  
25 See Judge Beistline's Text Order [Docket 31]. The Government  
asked for an extension until September in order to obtain a  
neurologist, which was non-opposed. See Judge Beistline's Text

1 Government gave no indication it was blaming CRNA Bowler for Mr.  
2 Lusk's injuries. The Assistant United States Attorney examining  
3 CRNA Bowler did not ask a single question indicating the  
4 Government was critical of her care of Mr. Lusk. In fact, the  
5 Government did not even mention the dosage of Sevoflurane,<sup>17</sup>  
6 which is Dr. Eisler's main criticism of CRNA Bowler.<sup>18</sup> CRNA  
7 Bowler was not asked to defend her anesthesiology care related  
8 to Mr. Lusk's blood pressure during the procedure.  
9

10 CRNA Bowler was, however, questioned extensively about her  
11 employment at the VA. CRNA Bowler has worked at the VA since  
12 1993.<sup>19</sup> It is her main source of employment.<sup>20</sup> While she  
13 considers herself an independent contractor, VA documents  
14 demonstrate that CRNA Bowler was considered by the VA to be an  
15 indefinite on-site employee as late as 2004.<sup>21</sup>  
16

17  
18 Order [Docket 37]. When CRNA Bowler was deposed, the Government  
19 had surely retained and consulted with Dr. Eisler, its expert,  
20 and must have known that Dr. Eisler intended to blame CRNA  
21 Bowler for Mr. Lusk's injuries.

22 <sup>17</sup> Sevoflurane is the anesthetic agent utilized by CRNA Bowler  
23 during the surgical procedure.

24 <sup>18</sup> Exhibit C, Expert Report of Dr. Eisler, Sept. 24, 2012.

25 <sup>19</sup> Exhibit D, Dep. of Brenda Bowler at 69, June 13, 2012.

26 <sup>20</sup> *Id.* at 76.

<sup>21</sup> *Id.* at 9; see also Exhibit E, Contract, Sept. 15, 2004.

1 CRNA Bowler is a member of the medical staff at the VA.<sup>22</sup>  
2 In fact, the VA website listed CRNA Bowler as an Anesthetist  
3 under its "Our Doctors" link and included a picture of her.<sup>23</sup>  
4 From the 1990's until 2004, CRNA Bowler was the only anesthesia  
5 provider for the VA.<sup>24</sup> She was required to follow VA policy  
6 about what she wears during procedures.<sup>25</sup> CRNA Bowler cannot  
7 choose her patients or refuse to provide services to a patient  
8 she does not like.<sup>26</sup> The VA schedules the patients to whom CRNA  
9 Bowler provides anesthesia care.<sup>27</sup>

11 As a member of the medical staff at the VA, CRNA Bowler  
12 must abide by the detailed VA medical staff bylaws and  
13 handbooks.<sup>28</sup> The chief surgeon at the VA Ambulatory Surgery  
14 Center is CRNA Bowler's direct supervisor, and the person to  
15

16  
17 <sup>22</sup> Exhibit D at 68.

18 <sup>23</sup> See Exhibit F, Copy of Screen Shot from  
19 <http://www.va.gov/providerinfo/ALASKA/index.asp>. Designating  
20 CRNA Bowler as one of "Our Doctors" was still on the website  
21 before CRNA Bowler's deposition in June 2012. Apparently, after  
22 this was brought to the Government's attention at CRNA Bowler's  
23 deposition, the VA removed CRNA Bowler's name from the website.

24 <sup>24</sup> See Exhibit D at 75-76.

25 <sup>25</sup> *Id.* at 108-109.

26 <sup>26</sup> *Id.* at 109.

27 <sup>27</sup> *Id.* at 23.

28 <sup>28</sup> *Id.* at 29.



1 whom she answers if there is any problem with care she  
2 provides.<sup>29</sup> The VA dictates all aspects of CRNA Bowler's care of  
3 patients.

4 There is a VA handbook that is specific to the Ambulatory  
5 Surgery Center.<sup>30</sup> CRNA Bowler acknowledged that the detailed  
6 requirements in the handbook govern every essential aspect of  
7 her day-to-day work as a nurse anesthetist.<sup>31</sup> CRNA Bowler  
8 admitted that if she failed to abide by any of these policies  
9 governing her day-to-day activities of patient care or  
10 documentation, she could be disciplined by the Chief of Surgery  
11 or have staff privileges restricted in some way.<sup>32</sup>

12 CRNA Bowler acknowledged that while she is in the operating  
13 room, however, the surgeon has the ultimate authority about what  
14 is going on during that surgery.<sup>33</sup> CRNA Bowler admitted that if  
15 a surgeon directed her to do something during the surgery, she  
16 could express her unwillingness to do it, but the surgeon had  
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21 <sup>29</sup> *Id.* at 70.

22 <sup>30</sup> Exhibit G, Excerpts from VHA Handbook, May 20, 2003.

23 <sup>31</sup> See Exhibit D at 104.

24 <sup>32</sup> *Id.* at 103-104.

25 <sup>33</sup> *Id.* at 105.

1 the authority to trump her and get another provider into the  
2 procedure to do what the doctor wanted done.<sup>34</sup> In this case, Dr.  
3 Gates was the surgeon, and Dr. Gates is an employee of the VA.<sup>35</sup>  
4

5 **III. ARGUMENT**

6 **A. Bowler is an Agent of the Federal Government.**

7 The Government thought of and treated CRNA Bowler as an  
8 employee, and therefore an agent of the Government subject to  
9 the FTCA, since before the inception of this litigation. Now,  
10 the Government claims that CRNA Bowler is not an employee, that  
11 she directly caused Mr. Lusk's permanent injury, and that the  
12 Government is not responsible for her negligence.<sup>36</sup>  
13

14 The Ninth Circuit instructs that the summary judgment  
15 standard set out in Fed. R. Civ. P. 56(c) governs determinations  
16 of agency status under the FTCA, where the jurisdictional and  
17 substantive issues are intertwined and resolving the  
18 jurisdictional question depends on factual issues impacting the  
19 merits. The Court must determine whether there are any genuine  
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23 <sup>34</sup> *Id.* at 106-107.

24 <sup>35</sup> *Id.* at 107.

25 <sup>36</sup> *See* Exhibit C.

1 issues of material fact, and apply the undisputed facts to the  
2 relevant substantive law.<sup>37</sup>

3 This Court can find that CRNA Bowler is an agent under the  
4 FTCA even if she is nominally called an independent contractor.  
5 "Employee of the Government" includes in relevant part,  
6 "[p]ersons acting on behalf of a federal agency in an official  
7 capacity, temporarily or permanently in the service of the  
8 United States, whether with or without compensation. . . ." <sup>38</sup>  
9 Thus, an agent, officer or employee of the Government is covered  
10 by the FTCA.

11 However, the FTCA expressly excludes "any contractor with  
12 the United States."<sup>39</sup> Where the Government alleges that the  
13 "independent contractor" exception to the FTCA applies, it bears  
14 the burden of proof.<sup>40</sup> Thus, the Government bears the burden to  
15 prove that CRNA Bowler is not an agent/employee of the federal  
16 government. Plaintiff seeks a determination that CRNA Bowler is  
17 an agent/employee for the purposes of determining culpability  
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21 <sup>37</sup> *Id.*

22 <sup>38</sup> 28 U.S.C.A. § 2671.

23 <sup>39</sup> *Id.*

24 <sup>40</sup> See *Prescott v. United States*, 973 F.2d 696, 702 (9<sup>th</sup> Cir.  
25 1992).

1 under the FTCA, based on undisputed facts and a proper  
2 application of the law to those facts.

3 Agency is a legal question that can only be answered after  
4 assessing the facts of the relationship and applying the law of  
5 agency to those facts.<sup>41</sup> A party's characterization of the  
6 relationship is not controlling.<sup>42</sup> Thus, the Government's recent  
7 claim that she was an independent contractor excluded from  
8 coverage under the FTCA bears no weight.  
9

10 In *Autery v. United States*, the Ninth Circuit explained  
11 that

12 The critical test for distinguishing an agent from a  
13 contractor is the existence of federal authority to  
14 control and supervise the 'detailed physical  
15 performance' and 'day to day operations' of the  
16 contractor. ... [There must be] substantial supervision  
17 over the day-to-day operations of the contractor in  
18 order to find that the individual was acting as a  
19 government employee.<sup>43</sup>

20 Other factors to consider are 1) whether the employer supplies  
21 the tools, 2) whether the employer supplies the equipment and  
22

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23 <sup>41</sup> RESTATEMENT (THIRD) OF AGENCY § 1.02 cmt. a (2012).

24 <sup>42</sup> *Id.*

25 <sup>43</sup> *Autery v. United States*, 424 F.3d 944, 956 - 57 (9<sup>th</sup> Cir.  
26 2005) (citations omitted).

1 the place of work, 3) the length of time the person is employed,  
2 and 4) whether the method of payment is by time or by the job.<sup>44</sup>

3 Each of these factors supports a finding of agency for CRNA  
4 Bowler. The uncontradicted facts show that the VA supplies all  
5 of the equipment, materials, and medications CRNA Bowler uses as  
6 a nurse anesthetist.<sup>45</sup> She works only at the VA Ambulatory  
7 Surgery Center and maintains an office there with her personal  
8 belongings.<sup>46</sup> CRNA Bowler has worked for the VA as a nurse  
9 anesthetist for nearly 20 years.<sup>47</sup> Finally, CRNA Bowler is paid  
10 on a monthly basis, not by job.<sup>48</sup> These facts make it clear that  
11 using the factors set out in *Will v. United States* and the  
12 *Restatement*, CRNA Bowler was acting as an agent/employee of the  
13 Federal Government when she provided the anesthesia care for Mr.  
14 Lusk during his shoulder surgery that resulted in his permanent  
15 injury subject of this suit.<sup>49</sup>  
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19 <sup>44</sup> *Will*, 60 F.3d at 659 (9<sup>th</sup> Cir. 1995)(citing 1 Lester S.  
20 Jayson, *Handling of Federal Tort Claims* § 8.04[1], 8-64 to 8-65;  
21 *Restatement* (Second) of Agency § 220(2)).

22 <sup>45</sup> Exhibit D at 110.

23 <sup>46</sup> *Id.*

24 <sup>47</sup> *Id.* at 75-76.

25 <sup>48</sup> *Id.* at 19.

26 <sup>49</sup> *Will v. United States*, 60 F.3d 656, 659 (9<sup>th</sup> Cir.  
1995)(citing 1 Lester S. Jayson, *Handling of Federal Tort Claims*

1 In *Autery*, the Ninth Circuit found that fire management  
2 contractors were not Government employees because the Government  
3 did not direct "the actual performance of the contract (e.g.,  
4 how to fight the fires, or how to disc the soils, or how to  
5 conduct a controlled burn)." <sup>50</sup> The parties in *Autery* agreed that  
6 that the Government did not supervise or direct the day-to-day  
7 operations of the contractor making that person a "de facto  
8 Government employee." <sup>51</sup> By contrast, CRNA Bowler was directly  
9 supervised by the Chief of Surgery at the VA Ambulatory Surgery  
10 Center. In fact, according to the VA Ambulatory Surgery Center  
11 Handbook, for a patient like Mr. Lusk with an ASA III  
12 classification, the Chief of Surgery, not the nurse anesthetist,  
13 was required to develop an anesthesia treatment approach. <sup>52</sup> CRNA  
14 Bowler acknowledged that this policy applied to a patient with  
15 an ASA Class III and above. <sup>53</sup> She also acknowledged that Mr.

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19 § 8.04[1], 8-64 to 8-65; Restatement (Second) of Agency  
§ 220(2)).

20 <sup>50</sup> *Autery*, 424 F.3d at 957.

21 <sup>51</sup> *Id.*

22 <sup>52</sup> Exhibit H, Excerpts from VHA Handbook, May 20, 2003.

23 <sup>53</sup> Exhibit D at 90. The ASA physical status classification  
24 system assesses a patient's fitness for surgery. A patient is  
25 an ASA III when there is a severe systemic disturbance from one  
or more causes. An ASA III patient is at higher risk for  
26 complications. *Id.*

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1 Lusk was an ASA Class III.<sup>54</sup> In other words, on a patient like  
2 Mr. Lusk, the Chief of Surgery was driving the care, exerting  
3 federal authority to control and supervise the 'detailed  
4 physical performance' and 'day to day operations' of the CRNA,  
5 as the *Autery* Court cited as a basis to find an agency  
6 relationship subjecting the Government to liability under the  
7 FTCA upon proof of negligence.<sup>55</sup>

8  
9 The detailed rules implemented for anesthesia care  
10 illustrate that the VA assumed a duty of direct supervision and  
11 control over nurse anesthetists. CRNA Bowler admitted that the  
12 Chief of Surgery supervised her, and could discipline, restrict  
13 or suspend her privileges based on any failure to follow the  
14 detailed VA requirements of how she cared for a patient.<sup>56</sup>

15  
16 In addition to the specific requirements established by the  
17 Chief of Surgery, CRNA Bowler was also under the supervision of  
18 the surgeon during the surgery. She admitted that the surgeon  
19 has the ultimate authority on what happens during the surgery.<sup>57</sup>  
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21  
22 <sup>54</sup> *Id.* at 91, 93.

23 <sup>55</sup> *Autery*, 424 F.3d at 957 (citations omitted).

24 <sup>56</sup> Exhibit D at 91, 93.

25 <sup>57</sup> *Id.*

1 Both the Chief of Surgery and Dr. Gates are VA employees, and  
2 CRNA Bowler worked under their general and specific direction  
3 and control.

4       However, CRNA Bowler was more than just directly  
5 supervised. The VA Ambulatory Surgery Center Handbook detailed  
6 how CRNA Bowler performed her job on a day-to-day basis from the  
7 moment she met a patient until that patient left her care. That  
8 handbook fixed specific and precise requirements about what CRNA  
9 Bowler had to do and not do before a surgery. The VA required  
10 that CRNA Bowler do a pre-anesthesia evaluation.<sup>58</sup> The VA  
11 mandated that "[a] member of the anesthesia care team is  
12 responsible for determining the status of the patient,  
13 developing a plan of anesthesia care, and acquainting the  
14 patient or responsible adult with the proposed plan."<sup>59</sup> The  
15 policy then outlined in detail what must be done to develop that  
16 plan, including 1) reviewing the medical record, 2) interviewing  
17 and examining the patient, 3) obtaining or reviewing tests and  
18 consultations necessary to the conduct of anesthesia, and 3)  
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24 <sup>58</sup> *Id.* at 96-97.

25 <sup>59</sup> *Id.* at 97.



1 determining the appropriate prescription of pre-operative  
2 medications.<sup>60</sup>

3 The Handbook also specified what CRNA Bowler did during a  
4 surgery.<sup>61</sup> CRNA Bowler was required to stay in the operating  
5 room throughout the entire procedure, and she had to monitor  
6 "oxygenation, ventilation, circulation and temperature"  
7 continuously.<sup>62</sup> The VA even gave specific instructions about  
8 monitoring body temperature, requiring that it be done  
9 continually looking for significant changes in body temperature  
10 that are "intended, anticipated or suspected."<sup>63</sup>

11 Finally, the Handbook dictated how she cared for a patient  
12 after the surgery. The VA defined appropriate post anesthesia  
13 management requiring that CRNA Bowler transport the patient to  
14 the Post Anesthesia Care Unit (PACU), that she continually  
15 monitor and treat the patient during transport, that the patient  
16 be reevaluated upon arrival at the PACU, and that she provide a  
17 verbal report to the responsible PACU nurse.<sup>64</sup> CRNA Bowler  
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21 <sup>60</sup> *Id.* at 98.

22 <sup>61</sup> *Id.* at 99.

23 <sup>62</sup> *Id.*

24 <sup>63</sup> *Id.* at 99-100.

25 <sup>64</sup> *Id.* at 100-101.

1 admitted that the VA handbook included a requirement for each  
2 aspect of how she cared for a patient from the beginning to the  
3 end of her anesthesia care.

4 The VA not only dictated how CRNA Bowler treated the  
5 patient through every step, it also has specific and detailed  
6 requirements about documenting the treatment provided at each  
7 stage.<sup>65</sup> This is not a general documentation policy, instead it  
8 specified exactly seven things that CRNA Bowler must document in  
9 the pre-anesthesia evaluation including the patient interview,  
10 physical examination, review of diagnostic tests, an ASA  
11 physical status rating assignment to the patient, the anesthesia  
12 plan, discussing that plan with the patient, and the consent of  
13 the patient to go forward.<sup>66</sup> Additionally, CRNA Bowler is  
14 required to document seven specific areas during the surgery  
15 including the specific time for each documented area.<sup>67</sup> Finally,  
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19 <sup>65</sup> *Id.* at 102-103.

20 <sup>66</sup> Exhibit I, Excerpts from VHA Handbook, March 7, 2007.

21 <sup>67</sup> *Id.* at 2470. The Handbook requires CRNA Bowler to document  
22 1) that she reviewed the preoperative evaluation immediately  
23 before initiating anesthesia; 2) monitoring of the patient  
24 including recording of vital signs; 3) all drugs and agents  
25 used, and the times each is given; 4) the type and amounts of  
26 all intravenous fluids used, including blood and blood products  
and the times each was given; 5) the techniques used; 6) unusual  
events during anesthesia; and 7) the status of the patient at  
the conclusion of anesthesia.

1 CRNA Bowler is required by the VA to document in detail all of  
2 her post-anesthesia care including six more specific areas.<sup>68</sup>  
3 CRNA Bowler admitted she is required to document all of these  
4 things.<sup>69</sup> As the Ninth Circuit explained in *Autery*, these sort  
5 of detailed directives from the VA show control over day to day  
6 operations required to establish agency under the FTCA.  
7

8 The Ninth Circuit has not specifically considered whether a  
9 nurse anesthetist is an independent contractor under the FTCA.  
10 However, some Circuit Courts have found that certified nurse  
11 anesthetists under a contract with the Federal Government are  
12 agents for the purposes of the FTCA.<sup>70</sup>  
13

14 The 10<sup>th</sup> Circuit, in *Bird v. United States*, explained the  
15 differences between nurses and doctors by distinguishing its  
16 FTCA holding regarding physicians in the following ways:  
17

18 <sup>68</sup> *Id.* Post-anesthesia documentation must include: 1) patient  
19 evaluation on admission and discharge from the PACU; 2) a time  
20 based record of vital signs and level of consciousness; 3) all  
21 drugs administered, doses, and routes of administration; 4) all  
22 intravenous fluids administered; 5) any unusual events or  
23 complications; and 6) any post anesthesia visits with the  
24 patient. CRNA Bowler is required to first record this  
25 information on written forms, and then also required to input  
26 some of the information into the VA electronic medical records  
system for each patient.

<sup>69</sup> Exhibit D at 102-103.

<sup>70</sup> *Bird v. United States*, 949 F.2d 1079, 1088 (10<sup>th</sup> Cir. 1991);  
*Bryant v. United States*, 2000 WL 33201357 at 8. (D. Ariz. Jan.  
11, 2000).

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- 1) Doctors are not required by the Army hospital to always see patients there;
- 2) An independent doctor can refuse to treat a military patient if he wanted to;
- 3) An independent doctor can see patients at his private office;
- 4) An independent doctor maintains an off-base office and has exclusive control over his patients records;
- 5) The Army did not provide the independent doctor office space;
- 6) The Army did not provide the private doctor secretarial help;
- 7) The doctor was not regularly scheduled on the hospital duty roster;
- 8) The Army controlled little about the manner or method used in reaching an end result of treating the patient.<sup>71</sup>

The above cited facts show that CRNA Bowler is very different from an independent contracting physician, considering the factors considered in *Bird*.

Unlike a physician anesthesiologist, under Alaska law CRNA Bowler is **required** to collaborate with either the "director of anesthesia" or the "primary physician . . . responsible for the patient's immediate care."<sup>72</sup> In fact, the Alaska Administrative

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<sup>71</sup> *Bird*, 949 F.2d at 1085.

<sup>72</sup> 12 AAC 44.510(b).

1 Code requires a nurse anesthetist applying for a license to  
2 identify the anesthesiologist or other doctor with whom they  
3 will most frequently collaborate, and submit a "communication  
4 plan for collaborating on cases with physicians during the  
5 preoperative, perioperative and postoperative periods[.]"<sup>73</sup>

6 Unlike doctors, nurse anesthetists are not given complete  
7 discretion over their patients. Under the VA Rules, the  
8 anesthetist/physician collaboration is directed by the Chief of  
9 Surgery and surgeon in each case. This pattern of subservient  
10 care complies with the American Society for Anesthesiologists'  
11 Recommended Scope of Practice of Nurse Anesthetists and  
12 Anesthesiology Assistants, which recognizes the difference,  
13 noting that "[b]ecause nurse anesthetists . . . are not trained  
14 to make medical judgments, virtually all states require direct  
15 physician participation in care provided by these anesthesia  
16 providers. State statutes and regulations specify the  
17 requirements for medical direction or supervision of the nurse  
18 anesthetists by a physician . . ." <sup>74</sup>

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23 <sup>73</sup> 12 AAC 44.500(a)(3)(B)-(C).

24 <sup>74</sup> See Exhibit J, Recommended Scope of Practice of Nurse  
25 Anesthetists.

1 According to the VA bylaws and CRNA Bowler, the Chief of  
2 Surgery does more than just collaborate with her; he is required  
3 to directly supervise CRNA Bowler to make sure she is following  
4 the specific and detailed requirements of patient care.  
5 Further, while the VA surgeon collaborates with CRNA Bowler, he  
6 has the ultimate authority about what happens to the patient  
7 during the surgery.  
8

9 Under circumstances not present here, the Ninth Circuit  
10 ruled that a contract physician is an independent contractor  
11 under the FTCA.<sup>75</sup> *Carrillo* involved a FTCA claim against the  
12 Army for a doctor whose pediatric group contracted with the Army  
13 base.<sup>76</sup> The Ninth Circuit decided that because the Army did not  
14 have "any control over Dr. Ozimek's practice of medicine" in  
15 "diagnosing and treating patients," he was not an employee.<sup>77</sup>  
16 The only evidence of control exhibited by the Army in *Carrillo*  
17 was over Dr. Ozimek's "administrative duties," and "to some  
18 extent the hours he would see patients."<sup>78</sup> As discussed above,  
19  
20

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21 <sup>75</sup> *Carrillo v. United States*, 5 F.3d 1302, 1305 (9<sup>th</sup> Cir.  
22 1993).

23 <sup>76</sup> *Id.* at 1303.

24 <sup>77</sup> *Id.* at 1305.

25 <sup>78</sup> *Id.*

1 the evidence of the VA's control over CRNA Bowler's treatment of  
2 patients is night and day in comparison.

3 In short, the VA directly supervised and dictated each  
4 aspect of CRNA Bowler's care of patients from the moment she met  
5 them, until they were released from her care. The Government  
6 exercised day-to-day and moment-to-moment control over treatment  
7 of patients in CRNA Bowler's care for nearly two decades. The  
8 VA held CRNA Bowler as an employee, because she is a de facto  
9 employee regardless of her contractual status.

11 The Government cannot, after the fact, be allowed to dig  
12 out a contract and attempt to use it as a shield from liability.  
13 This is true, especially after it represented both before this  
14 litigation began and to the public on its website that CRNA  
15 Bowler was an employee. This impropriety is heightened by the  
16 Government's attempt to blame CRNA Bowler for Mr. Lusk's  
17 injuries only **after** it found this contractual shield and the  
18 court allowed it to amend its Answer. The Court should reject  
19 the Government's attempt to distance itself from the nurse  
20 anesthetist's care in this case and conclude as a matter of law  
21 and fact that CRNA Bowler is an agent of the Federal Government  
22 for purposes of finding liability under the FTCA.  
23  
24  
25  
26

Harry Curtis Lusk v. USA

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PLAINTIFF'S MOTION AND MEMORANDUM FOR PARTIAL

SUMMARY JUDGMENT

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1        **B. The Doctrine of Equitable Estoppel Prohibits the Government**  
2        **from Arguing CRNA Bowler is not an Employee.**

3        Plaintiff is entitled, based on the facts and law, to a  
4        finding that CRNA Bowler is an agent of the federal government.  
5        In the unlikely event that the Court concludes otherwise, equity  
6        demands that the Government should be estopped from claiming  
7        that CRNA Bowler is an independent contractor under the  
8        undisputed facts of this case. The Ninth Circuit explains that  
9        "where justice and fair play require it," estoppel will be  
10       applied against the Government.<sup>79</sup>

11       Traditional elements of estoppel require showing that (1)  
12       the person knew the facts; (2) and knew or should have known  
13       that their assertion would be relied upon; (3) the other party  
14       must be ignorant of the true facts; and (4) the other party must  
15       rely on the former's conduct to his injury.<sup>80</sup> Each traditional  
16       element of estoppel is satisfied here. First, the VA held CRNA  
17       Bowler out as an employee in the VA Ambulatory Surgery Center.  
18       The VA website identified her as an employee, the VA General  
19  
20  
21  
22

23       <sup>79</sup> *Watkins v. U.S. Army*, 875 F.2d 699, 706-07 (9<sup>th</sup> Cir.  
24       1989)(quoting *United States v. Lazy FC Ranch*, 481 F.2d 985, 988-  
25       89 (9<sup>th</sup> Cir. 1973)).

26       <sup>80</sup> *Id.* at 709.



1 Counsel said she was an employee before the litigation began,<sup>81</sup>  
2 and the Government admitted she was an employee in its Answer.  
3 Mr. Lusk relied on the Government's misrepresentations to his  
4 detriment because he cannot file a lawsuit against CRNA Bowler  
5 now because the statute of limitations ran for him to make a  
6 direct claim against her.<sup>82</sup>  
7

8 Before filing the Form 95 Administrative Claim and before  
9 the state statute of limitations expired, VA General Counsel  
10 told Mr. Lusk's counsel that Dr. Gates, Mr. Hull and CRNA Bowler  
11 were federal employees.<sup>83</sup> Similarly, when the VA denied the  
12 administrative claim almost an entire year later, it asserted a  
13 thorough investigation including "interviews with the VA  
14 healthcare providers" and consultation with "independent medical  
15 experts" revealed no wrongdoing.<sup>84</sup> Finally, the Government  
16 answered the Complaint and admitted that CRNA Bowler was an  
17 employee of the Federal Government and denied that her care was  
18 negligent. The Government should be estopped from claiming  
19 otherwise now.  
20  
21

---

22 <sup>81</sup> See Aff. of Counsel [Docket 19].

23 <sup>82</sup> *Id.*

24 <sup>83</sup> *Id.*

25 <sup>84</sup> See Exhibit A.

1           The VA General Counsel and US Attorney's Office had  
2 exclusive access to CRNA Bowler's contracts and they had the  
3 affirmative obligation to accurately represent that information  
4 and produce it to Mr. Lusk. Additionally, as lawyers they  
5 understand the significance of determining this relationship  
6 from the start of litigation. Even if this was a  
7 misunderstanding, the Government's exclusive control of the  
8 information made it impossible for Plaintiff to know otherwise.  
9 Mr. Lusk could only ask, and they answered repeatedly that CRNA  
10 Bowler was an employee. Under Fed. R. Evid. 801(d)(2) these  
11 repeated affirmative admissions that CRNA Bowler was a federal  
12 employee are undeniably admissions by a party-opponent.  
13

14           The VA knew Mr. Lusk would have to rely on those  
15 representations in filing and prosecuting his case in federal  
16 court against the Government. Mr. Lusk was undeniably ignorant  
17 of the true facts, and the Government failed to produce the  
18 subsequent contract for the first 3 ½ years. Mr. Lusk relied on  
19 the Government's representations to his detriment, because it  
20 prohibited him from individually naming CRNA Bowler before the  
21 statute of limitations ran in state court. Thus, the  
22 Government's conduct easily satisfies the traditional elements  
23 for estoppel.  
24  
25  
26

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1 Estoppel against the Government requires proving two  
2 additional factors: 1) affirmative misconduct going beyond mere  
3 negligence, and 2) the Government's wrongful act will cause a  
4 serious injustice and the public's interest will not suffer  
5 undue damage by imposition of the liability.<sup>85</sup> Affirmative  
6 misconduct requires an affirmative misrepresentation, but it  
7 does not require that the Government intended to mislead a  
8 party.<sup>86</sup>

9  
10 Here, the Government actively and affirmatively misled Mr.  
11 Lusk about CRNA Bowler's status as an employee. It goes beyond  
12 negligence given the length of time, the context of litigation  
13 and the repeated forums in which the Government misrepresented  
14 CRNA Bowler's employment status. Additionally, the  
15 misrepresentations were not made by Government clerks or  
16 untrained personnel, but instead by Government lawyers with the  
17 full knowledge, training and hyper-awareness that such  
18 misrepresentations could and would foreclose Mr. Lusk's legal  
19 rights.  
20

21 Satisfying the second prong of estoppel against the  
22 Government, Mr. Lusk relied on the misrepresentations to his  
23

24 <sup>85</sup> *Watkins*, 875 F.2d at 707.

25 <sup>86</sup> *Id.*

1 detriment. Mr. Lusk did not separately name CRNA Bowler since  
2 the VA and Government admitted that she was an employee. Had  
3 the VA informed Mr. Lusk's counsel that CRNA Bowler was or even  
4 might be an independent contractor, she would have been  
5 individually named as a defendant and a state court lawsuit  
6 would have been filed.<sup>87</sup> By the time the Government changed its  
7 mind about CRNA Bowler's status, the statute of limitations  
8 imposed on Mr. Lusk for her conduct individually had long  
9 passed.

11 The affirmative misrepresentation about CRNA Bowler's  
12 status causes a serious injustice. If the Government is allowed  
13 to foist this late-blame onto CRNA Bowler and also disclaim  
14 responsibility for her, Mr. Lusk could be without a remedy  
15 against CRNA Bowler. Additionally, Mr. Lusk is forced to switch  
16 gears now years into this litigation and disprove the  
17 Government's new strategy of blame.

19 Finally, the public's interest will not suffer undue damage  
20 by imposing estoppel. The Federal Government is responsible for  
21 medical malpractice that occurs in its hospitals. That is one  
22 of the purposes of the FTCA. Applying estoppel here is not an  
23

24  
25 <sup>87</sup> See Aff. of Counsel [Docket 19].

1 undue impact to the public interest because this type of  
2 compensation is contemplated by statute. In fact, the public  
3 interest is served in blocking the Government's attempt to duck  
4 responsibility.

5 In *Carrillo v. United States*, the Ninth Circuit also  
6 considered an estoppel claim after finding the doctor was an  
7 independent contractor.<sup>88</sup> The court rejected the claim because  
8 the patient signed a consent form that stated the doctor was a  
9 civilian.<sup>89</sup> In contrast, Mr. Lusk signed a specific anesthesia  
10 consent form that ***did not reveal*** that CRNA Bowler was 1) a nurse  
11 anesthetist not a doctor or 2) an independent  
12 contractor/civilian.<sup>90</sup> Additionally, in *Carrillo*, there was no  
13 evidence that the Government actively misled the plaintiff about  
14 the doctor's status for 3 ½ years ***before and during the***  
15 ***litigation.***

16 The Government should be bound to its affirmative  
17 misrepresentation that CRNA Bowler was a VA employee. It should  
18 be estopped from disclaiming responsibility for her care because  
19

20  
21  
22 <sup>88</sup> *Carrillo*, 5 F.3d at 1306.

23 <sup>89</sup> *Id.*

24 <sup>90</sup> Exhibit K, Anesthesia Consent. In fact, the consent  
25 identifies "Foley, Susan J Crna (Anesthesiologist)." CRNA Foley  
26 is not an anesthesiologist.

1 it knew Plaintiff would rely on its representations regarding  
2 her status to his detriment.

3 **C. Alaska Law of Apparent Agency in the Hospital Context**  
4 **Controls this Case.**

5 The Alaska Supreme Court recognized apparent authority or  
6 agency in *Jackson v. Power*, which focused on the hospital's  
7 actions of holding out an emergency room doctor as an employee  
8 and the reasonable patient's expectations in the hospital.<sup>91</sup>  
9 *Jackson* is controlling here since the Court must apply the state  
10 law in determining the extent of FTCA liability.<sup>92</sup>

11 Mr. Lusk believed the VA Ambulatory Surgery Center to be a  
12 full service hospital. He was not told CRNA Bowler was an  
13 independent contractor. As discussed at length above, the VA  
14 undeniably held CRNA Bowler out to be an employee of the VA in  
15

16  
17 <sup>91</sup> 743 P.2d 1376, 1381 (Alaska 1987). The Alaska Legislature  
18 passed AS 09.65.096, which only absolves hospitals of liability  
19 for emergency room physicians who are contractors when the  
20 hospital posts a notice to patients that the physicians in the  
21 emergency room are independent contractors and not employees.  
22 The notice must be at least "two feet high and two feet wide,  
23 with print at least two inches high," and another notice must be  
24 published annually in the local newspaper. Obviously, no such  
notice is provided by the VA. Additionally, the statute only  
specifically applies to emergency room doctors. Subsequent  
cases suggest *Jackson* is good law and may apply to providers  
within the hospital who are not emergency room doctors. See  
*Fletcher v. South Peninsula Hospital*, 71 P.3d 833, 840-41  
(Alaska 2003).

25 <sup>92</sup> *Molzof v. United States*, 502 U.S. 301, 305 (1992).

1 every discernible way. Additionally, like emergency room  
2 doctors, patients cannot and do not chose their  
3 anesthesiologists, nor do anesthesiologists see patients outside  
4 of the surgery setting. *Jackson's* recognition of apparent agency  
5 for the purposes of equitable estoppel should apply here.

6  
7 Using a similar analysis, federal district courts have  
8 applied estoppel to prevent the Government from using the FTCA  
9 independent contractor exception to "insulate itself by  
10 contractual arrangement from liability for acts of medical  
11 malpractice committed by an anesthesiologist in a VA hospital."<sup>93</sup>  
12 In *Gamble v. United States*, the court avoided the control test  
13 under the FTCA and instead found the VA was responsible for  
14 negligence of an anesthesiologist because of estoppel.<sup>94</sup> The  
15 court found "agency by estoppel is established by creating an  
16 effect - the appearance that the hospital agents, not  
17 independent contractors, will provide medical care to those who  
18 enter the hospital."<sup>95</sup>

19  
20  
21 <sup>93</sup> *Gamble v. United States*, 648 F.Supp. 438, 441 (N.D. Ohio  
22 1986); *Utterback v. United States*, 668 F.Supp. 602, 607 (W.D.  
Kentucky 1987).

23 <sup>94</sup> *Gamble*, 648 F.Supp. at 441. It is worth noting that in  
24 *Gamble*, the anesthesiologist was a doctor, not a nurse  
anesthetist.

25 <sup>95</sup> *Id.*

1       The court recognized that patients do not normally chose  
2       their anesthesiologist, nor are they told the provider is an  
3       independent contractor, so patients rely on the VA to provide  
4       the service.<sup>96</sup> The court also found that sound public policy  
5       "demand[s] that the United States not be permitted to  
6       contractually insulate itself from liability for acts of medical  
7       malpractice committed in government hospitals."<sup>97</sup>

9       Mr. Lusk has a permanent injury that makes his hands  
10      unusable. The Government now admits this was caused during his  
11      surgery at the VA Ambulatory Surgery Center. It is wrong to deny  
12      Mr. Lusk compensation for his many life care needs resulting  
13      from the injury during surgery. Both state and federal law  
14      support finding hospital liability when the hospital holds out  
15      health care providers as employees.

17  
18   **IV. CONCLUSION**

19      At the time that Mr. Lusk underwent his shoulder surgery by  
20      Dr. Gates that resulted in his permanent injury under CRNA  
21      Bowler's anesthesia care, the undisputed facts show that she was  
22      an agent of the VA. It directly supervised her and dictated her  
23

---

24   <sup>96</sup>     *Id.*

25   <sup>97</sup>     *Id.* at 441-42.



1 day to day and moment to moment treatment of patients under her  
2 care. The VA told CRNA Bowler what to wear, when to show up, it  
3 scheduled her patients, it provided her with an office, it  
4 required her to specifically document each aspect of her care  
5 within the VA record keeping system, and it could discipline or  
6 revoke her privileges for any transgression. This satisfies the  
7 control test under the FTCA law.  
8

9 Further, given the Government's affirmative  
10 misrepresentation of CRNA Bowler's employee status in this  
11 litigation, and to the patients at the VA, it should be  
12 equitably estopped from using a contract to shield itself from  
13 liability. It is respectfully requested that the Court grant  
14 partial summary judgment on the issue of CRNA Bowler's status as  
15 an agent of the Federal Government.  
16

17 DATED this 24th day of October 2012, at Anchorage, Alaska.

18 DILLON & FINDLEY, P.C.  
19 Attorneys for Plaintiff

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on October 24,  
3 2012 a copy of the foregoing  
4 Plaintiff's Motion and Memorandum for  
Partial Summary Judgment was served  
electronically on E. Bryan Wilson.

5 s/Mauri Long

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